of the industry. This bill would provide lower electric rates for consumers by facilitating the regional distribution of surplus, low-cost power.

This proposal has earlier received support in this Chamber. In 1977, the administration proposed similar amendments to the Federal Power Act as part of a comprehensive National Energy Act. The House passed such legislation, but, in the face of overwhelming opposition by investor-owned utilities, the Senate declined to address the wheeling issue. In conference, a compromise was drafted, which is now part of the Public Utility Regulatory Policies Act of 1978. It contained so many preconditions to the issuance of wheeling orders that those provisions are virtually useless to the wheeling applicant.

Moreover, in a recent case, Southeastern Power Administration against Kentucky Utilities Co., the FERC construed these provisions restrictively and ruled that it lacked authority to order wheeling where the result would be the displacement of power sold by the utilities subject to the wheeling order. Thus, the FERC will not, under PURPA, require large investor-owned utilities to transmit low-cost, surplus power to publicly owned systems which are customers of the private utilities. It is clear, then, that the existing law will not promote competition within the electric utility industry.

Without my proposed amendments, investor-owned utilities will—as they have done routinely in the past—continue peremptorily to deny public power systems access to transmission lines. Competition in the bulk power market is thereby thwarted and potential buyers and sellers are unable to consummate economically attractive deals. My bill will insure that publicly owned utilities have a fair opportunity to compete with investor-owned utilities and that all electric utilities will be able to seek the least expensive power available, thus lowering the cost for the ultimate consumers.

The American Public Power Association, which represents about 1,750 publicly owned electric utilities, surveyed its member systems to determine the extent to which they were experiencing difficulties in obtaining transmission services. The responses reveal numerous problems and bottlenecks. Investor-owned utilities either refuse to wheel or engage in protracted negotiations and insist upon unreasonable terms and prices—thereby effectively refusing to wheel. The publicly owned utilities in my own State of California, for instance, have not been able to obtain access to the Pacific Northwest-Southwest Intertie and other transmission services and, thus, have effectively been denied access to the surplus hydroelectric power now available in the Pacific Northwest and less expensive power in other areas of the country.

The Department of Energy has reported that the regional transfer of electricity could result in substantial savings in electric utility plant investment and energy costs, with corresponding reductions in rates for electric consumers. DOE has identified lack of transmission access as a key to resolving this national problem. Accordingly, this bill would further a sensible, national energy policy.

My proposal would permit FERC, on its own motion or upon application of a State commission, or any electric utility, to order a utility to provide transmission services to another utility under just and reasonable rates, terms, and conditions. FERC would have to issue an order if its effect would be to conserve energy, promote the efficient use of facilities and resources, increase competition in the bulk power supply market, or is otherwise in the public interest.

My proposal also provides that the Commission shall, on its own motion or upon application of a State commission or any electric utility, order an electric utility owning or operating any bulk power tranmission facility to increase the capacity of that facility. such an order must be issued if its effect is to conserve energy. promote the efficient use of facilities and resources, increase competition, or is otherwise in the public interest. Again, the service to be rendered must be at just and reasonable rates.

This legislation will not impose unfair burdens on the utility subject to the wheeling order. It provides that no order can be issued if it would place an undue burden on a utility, significantly impair the utility's reliability, impair its ability to render adequate service to its customers, or result in the transmission of electricity to an ultimate consumer other than the customers of Federal or State agencies.

These amendments to the Federal Power Act are particularly relevant in light of the recent efforts of the investor-owned utilities to repeal the public preference in the relicensing of hydroelectric projects. In my view, H.R. 4402, introduced by my colleague, the gentleman from Alabama (Mr. SHELBY), would reduce competition between public and privately owned utilities, and I am opposed to that bill. The anticompetitive practices of the investor-owned utilities could be curbed by enactment of the antitrust review requirements containd in H.R. 5416, introduced by my colleague from Tennessee (Mr. GORE). But that proposal would require an antitrust review solely in the context of hydroelectric licensing and, in my judgment, further legislation is required. My proposal would be applicable to all electric utilities and would, therefore, deal with this problem on an industrywide basis.

As Federal Power Commissioner Charles Ross observed nearly two decades ago, "It is the parties who control the transmission, the arteries of the industry, that control the destiny of the millions of ratepayers of this Nation." That observation is no less valid today. I hope, therefore, for early consideration of this proposal.●

H.R. 2133—A BILL TO PROMOTE COMPETITION IN FEDERAL PURCHASING

HON. BERKLEY BEDELL

OF IOWA

IN THE HOUSE OF REPRESENTATIVES

Tuesday, May 8, 1984

● Mr. BEDELL. Mr. Speaker, I am making this statement today in an attempt to set the record straight on H.R. 2133. This bill was reported by the Small Business Committee last October and, along with the amendments I plan to offer on behalf of the bill's sponsors, seeks to make competition the rule rather than the exception in Federal procurement practices. The bill is scheduled for House consideration in mid-May.

Some of those opposing H.R. 2133 are the same ones that opposed the small business innovation development bill, Public Law 97-219. Even the Washington Post joined the battle and opposed the SBID bill. It is interesting to see how similar their arguments against the SBID bill and H.R. 2133 are.

Yet, the SBID bill passed, it passed overwhelmingly by a vote of 353 to 57. And it passed intact, the way its sponsors and the small business community wanted it to read. Guess what—the SBID programs are now being implemented by the very Federal agencies that initially opposed its passage. It is one of the most successful, competitive, and highly lauded Federal programs we have.

SPARE PARTS

Let us get back to H.R. 2133. Just what does the bill intend to do? H.R. 2133 has some very strong and important provisions that deal with the way the Federal Government purchases spare and replacement parts. For the first time, H.R. 2133 would legislate criteria to limit the sole-source contracting of spare parts. Only when the head of the buying activity determines that one of the following five exceptions exist may a sole-source contract be let: First, there is only one possible source; second, there is an urgent need for the parts; third, national security reasons make a sole-source award necessary; fourth, only one source has a legitimate proprietary interest; and, fifth, another statute requires a specific source.

In addition, H.R. 2133 contains provisions that deal with rights to proprietary data. The issue of what is a legitimate proprietary interest is a matter of considerable debate. On the one hand, it is a barrier to competition when a company improperly asserts proprietary rights on products that were developed at the public's expense

118

and could be manufactured by a number of potential competitors. On the other hand, an overly restrictive policy toward proprietary rights could cause many private businesses to think twice before selling a product to the Government.

Accordingly, H.R. 2133 directs the administration to issue rules and regulations that specify the status of rights to technical or other data which is developed in whole or in part with Federal funds. These rules shall set out a requirement that a clause pertaining to data rights be a part of the contract for each major systems acquisition. This clause must spell out the Government's right to own, license, use, or otherwise assess this data and the extent, if any, of the proprietary interest maintained by the contractor.

Furthermore, H.R. 2133 requires that the administration direct appropriate purchasing agencies to establish reverse engineering programs designed to give small businesses the opportunity to borrow or purchase spare parts for the purpose of design replication or modification.

I will also offer an amendment to require the Government to catalog, store, and inventory the technical data it owns in a manner to allow its ready access by small business.

These provisions in H.R. 2133 will go a long way to clean up the way the Federal Government purchases spare parts. And there is a lot to clean up. In fiscal year 1982, the military spent $13 billion on spare and replacement parts; $10 billion, or 77 percent, of these parts were purchased through sole-source, noncompetitive contracts. In a June 1983 report, the General Accounting Office said that savings of 30 to 40 percent could be possible if there were more competition on these purchases.

PREQUALIFICATION CRITERIA

H.R. 2133 also takes another very important step in opening up spare parts procurement practices. The bill seeks to limit the anticompetitive effects of prequalification criteria, such as qualified products and bidders lists. These lists are being used as screening devices to deny businesses who are not on the lists the opportunity to even submit bids.

The military maintains that these qualified lists are necessary to preserve quality on critical items. While qualified lists are undoubtedly used to purchase critical items, here are some items that we are presently purchasing off these lists that are clearly not critical: household lights, floor wax, flashlights, spark plugs, loudspeakers for shipboard entertainment systems, automotive grease, filing cabinets, laminated wooden boat paddles, and saw chains.

This screening out by using qualified lists to determine a bidder's responsiveness to a solicitation may lead to instances where the agency actually rejects a perfectly acceptable product at a price lower than it can purchase the product off of the qualified list. Of course, the agency will never know if other than prequalified suppliers can offer similar or superior products at lower prices if they never even review other bids. In cases where the product is vital to the safety and success of a mission, not reviewing a greater universe of sources may indeed be unwise.

H.R. 2133 simply gives businesses the right to submit offers and have them considered without altering the quality standards for any item. In fact, under this provision of H.R. 2133, it is entirely likely that the procuring agency will find sources that will not only supply the product at less expense, but because the bill will not affect quality standards in any way, the procuring agency may actually find superior products. The legislation does not require that an agency must accept a bid if the offered product does not meet its quality standards, or if there is not time for adequate testing prior to needed delivery time. Likewise, any bid can be rejected if the bidder is not considered to be responsible.

THE RULE OF TWO

A provision of H.R. 2133 that has drawn considerable opposition is the "rule of two." This area, perhaps, has been the most misinterpreted and misrepresented provision of the bill. You have probably been told that "virtually all of the Federal procurement contracts will have to go to small business" if this bill is passed.

Let us start with some facts:

Small business makes up approximately 99 percent of all of the businesses in America.

In fiscal year 1983 small business received only 13.75 percent of the value of prime Federal procurement contracts, down from 15.75 percent in fiscal year 1981.

In fiscal year 1983, the top five Department of Defense contractors received more prime contract dollars than the entire small business community.

Small business firms, in winning their paltry share of Federal prime contract dollars, were highly dependent on small business set-asides. In fact, one-half of the prime contract dollars at DOD going to small businesses went through small business set-asides. To small firms interested in Federal procurement, the set-aside program is vital.

Another point to make here is that small business set-asides are made on a competitive basis. These procurements are open for bidding to 99 percent of the business firms in America. In a report to the Congress transmitted last month, President Reagan said:

> Small business set-asides are by definition competitive and should not be confused with the SBA's 8(a) contract program . . .

Small business set-aside procurements are clearly vital to our goal of maintaining a diverse and healthy defense industrial base and to assuring the taxpayers of wise use of the Federal procurement dollar.

In contrast to the small business set-aside program, 60 percent of DOD's procurements are made on a sole-source, noncompetitive basis (according to DOD's own figures). In fact, less than 6 percent of DOD's procurements are even formally advertised for bid. I submit that competition among only 99 percent of the business firms in America is better than no competition at all.

A contracting officer implements a small business set-aside on a procurement he or she feels the criteria of the "rule of two" has been met. These are the criteria for the "rule of two":

The contracting officer determines that there is a reasonable expectation that, first, offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns, and second, awards will be made at reasonable prices.

An important concept of the "rule of two" is that a contracting officer may cancel a small business set-aside if he or she feels the Government is not getting a reasonable price for the goods or services, or if the contract award to a small business concern would not be in the public interest. The proposed award would then be resolicited on an unrestricted basis.

That criteria can be found in section 19.502-1 of the Federal acquisition regulations (FAR). The "rule of two" is current procurement regulation that guides all Federal procurement. There is nothing new about the "rule of two." It has been a formal procurement regulation at the Department of Defense since 1979. NASA also adopted the "rule of two" as their formal procurement policy in 1982. In a slightly different form, this criteria could also be found in the old Federal procurement regulations that were used by civilian agencies prior to the final adoption of the FAR.

Not only do Federal agencies presently use the "rule of two," they fully endorse it. In a letter to David Stockman dated April 18, 1984, Mary Ann Gilleece, the Deputy Under Secretary for Acquisition Management at the Department of Defense said:

> The only mechanism available to carry out this Congressional mandate is through the small business set-aside program which serves as the underpinning of the Federal agencies small business program.
>
> . . . These have worked effectively for almost thirty years to enhance the opportunities for small business and small disadvantaged business firms who participated in the acquisition of products and services by Federal agencies.
>
> We would like to note that small business set-asides generally result in more, not less competition. This increase in competition results because of two factors: There are a much greater number of small business firms than big business firms; secondly, the small business community perceives that when procurement is set-aside, it, by definition, cannot be a sole source award and that

they will be competing against their peers and therefore stand a realistic chance of winning the contract.

H.R. 2133 seeks to codify the "rule of two" as it appears in the FAR with the addition of one additional criterion—that the delivery of the goods or services will be rendered within the time needs of the procuring agency. Small business set-asides are of such importance to the minute share of prime contract awards that small business presently receives, it is necessary to protect this program with the force of law.

Remember almost half of all Federal prime contract dollars going to small business goes through the set-aside program. At the present time, tremendous pressure is being put on the Office of Management and Budget to withdraw the "rule of two" from the FAR. Organizations that wish to expand the 85 percent of the total procurement prime contract dollars that currently go to the largest 1 percent of the businesses in America are fighting tooth and nail to eliminate the "rule of two" from the FAR. Congress must step in and act before this program that is so vital to small business competition and our goal of maintaining a diverse and healthy defense industrial base is lost.

You undoubtedly have heard vague critcisms about the small business set-aside procurement program. For example, you have probably heard that H.R. 2133 would require that all or most of Federal procurements will have to go to small businesses, or that small firms will simply get contracts, skim off the profits and then subcontract out all the work to a big company. That is simply not true, and in fact cannot happen when the "rule of two" is properly implemented. Small businesses may only offer the products of small businesses under small business set-asides.

Furthermore, since 60 percent of DOD's work goes out under sole source, noncompetitive awards, the "rule of two" cannot be met in those circumstances because the contracting officer believes there is only one firm eligible to perform. Other procurements have defined elements of responsibility and likewise may not be suitable for small business set-aside awards. For example, when the Government is seeking "the best technical approach available" for a research and development task, the contracting officer may not be able to satisfy his or her expectation that the best approach will be found by using the small business set-aside procedure.

This brings me to another important point. Most of the basic research the Federal Government funds is done through grants and cooperative agreements. The National Institutes of Health, for example, uses approximately 90 percent of their research funds to fund unsolicited basic research grants to universities and other nonprofits. H.R. 2133 only applies to procurement contracts, not grants or cooperative agreements. Thus, it would not affect any of the research grant or cooperative agreement programs operated by Federal agencies.

Finally, I want to put to rest once and for all the notion that small business set-asides lead to shoddy performance by contractors that are merely shady fronts that ripoff the taxpayer. That characterization is plainly insulting and demeaning to small business contractors and procurement officials who are hardworking and constantly in battle with a system that is at odds with what is truly good for America. The "rule of two" clearly states that a potential contractor must be responsible. The FAR sets the standards by which a potential contractor is deemed responsible. A firm must: first, have adequate financial resources; second, be able to comply with delivery and performance schedules; third, have a satisfactory performance record; fourth, have a satisfactory record of integrity and business ethics; fifth, have necessary organization, experience, accounting and operational controls or the ability to obtain them; sixth, have the necessary production, construction and technical equipment and facilities, or the ability to obtain them; and seventh, be otherwise qualified and eligible.

THE "2 MILLION PRESUMPTION"

While H.R. 2133 adopts a current and time-tested Government policy in the "rule of two," it does require some new documentation with respect to its use.

Under current procurement policy at DOD, whenever that agency prepares solicitation for the acquisition of construction services that will result in a prime contract award for less than $2 million, that solicitation will be presumed to be eligible for a small business set-aside. The Department of Energy has also adopted this policy toward construction services, their threshold is set at $3 million.

H.R. 2133 adopts this policy and applies this presumption to all Federal contracts under $2 million (except where small purchase procurement procedures or reserve programs apply). I will, in addition, offer an amendment to this section that will exempt the procurement of research and development and other professional, technical, and management services from the presumption.

Just what does this presumption mean? I am sure you have heard that the presumption means that all Federal contracts for less than $2 million must now go to small business. Again, this is false.

Under the presumption clause in H.R. 2133, small business set-asides for procurements under $2 million may be lifted if the contracting officer prepares a determinations and findings stating that the criteria for the set-aside will not be met. The intent of this section is to make it administratively easier for the contracting officer to seek competition on contracts under $2 million than it is to sole source or otherwise noncompetitively let the contracts. This provision is vital to the proper implementation of the "rule of two." This provision will help bring the benefits of competition to thousands of procurement actions.

In the fiscal year 1981-83 period, of all procurement contracts going to small business, 67 percent were under $2 million. Overall, small firms received 36 percent of the contracts let by the Government under $2 million in value. Quite obviously, contracts in this range are extremely important to small firms. Hence, this presumption will make contracting officers think twice about obtaining small business competition on contract that otherwise would have gone out on a sole source, or other noncompetitive procedures.

Remember that the majority of Federal construction contracts are already awarded under this system. In addition, my amendment to this section will not affect the procurement of research and development and other professional, technical and management services (this presently includes architects and engineers). This presumption will get to the procurements that we need competition for the most—basic, low skill services and common hardware and tooled items that are not proprietary or patented. If an item is patented or proprietary, the contracting officer may issue a sole-source contract.

I hope this discussion of the major provisions of H.R. 2133 will help you understand the objectives of the legislation. Along with the other provisions of H.R. 2133, which are designed to fine tune existing procurement programs such as the Small Business Administration's certificate of competency program, small business reserve program, and the administration's small business procurement goal-setting procedures, these new legislative proposals seek to open the procurement process to the vast majority of firms in America that find themselves locked out by present procedures.

H.R. 2133 has the support of over 150 small business groups that represent the broad spectrum of businesses in the United States. These groups include the National Federation of Independent Business, the National Small Business Association, Small Business United, the National Machining and Tooling Association, and the Small Business Legislative Council.

ARCHITECTS AND ENGINEERS

On a final note, I want to comment on the opposition to H.R. 2133 that is being carried out by the architects and engineers. I understand that A&E firms have been active in contacting many congressional offices in opposition to H.R. 2133.

First, I must point out that my amendment to exempt professional, management, and technical services from the presumption provision would include exempting the procurement of A&E services from that section. The only part of the bill that still affects them is the "rule of two" and that is current regulation. Thus, nothing in H.R. 2133 changes the current system of procuring A&E services.

It is apparent that the lobbying effort against the bill on the part of the architects and engineers is being orchestrated by the largest 200 firms in the industry. Although these 200 firms make up only 0.07 percent of the 30,000 A&E firms in the country, a DOD report found that these firms receive 32.4 percent of DOD's A&E prime contract dollars. The DOD report from Secretary Weinberger further states that from fiscal year 1982 to fiscal year 1983 these firms increased their receipts from DOD from $71,730,000 to $139,819,000, an increase of 94.9 percent. By contrast, awards to small A&E firms increased only 20.1 percent in the same period.

The DOD report goes on to state that:

1. DOD's current implementation of set-asides in support of small business is statutorily authorized and correctly implemented through the Defense Acquisition Regulation.

2. DOD's implementation of the set-aside program has been supported by the courts and the GAO.

3. Quality performance of our requirements is not jeopardized by our current procedures, nor is mobilization readiness impaired.

Clearly, it appears that the opposition to H.R. 2133 on the part of the large A&E firms is an attempt to further increase their already disproportionate share of Federal A&E expenditures. If they can defeat the "rule of two" and have it removed from Federal procurement policy, they will take a large step toward eliminating competition from the small firms in their industry.

I urge you to stand firm against their effort.●

JAPAN PROBLEM ISN'T BEEF; IT'S HIGH-TECH TRADE

HON. TIMOTHY E. WIRTH

OF COLORADO

IN THE HOUSE OF REPRESENTATIVES

Tuesday, May 8, 1984

● Mr. WIRTH. Mr. Speaker, in a superb column recently, Hobart Rowen addressed the recent announcement that Japan would increase its imports of U.S. produced beef and citrus. As Rowen points out, both beef and citrus have assumed a symbolic quality that exceed their importance in the overall scheme of our balance of trade with Japan. We cannot assume that the recent announcement—welcome as it may be—indicates an end to our ongoing trade friction with Japan.

I would caution, however, that we cannot now belittle the recent announcement as meaningless. Both beef and citrus were often cited as examples of restrictive Japanese import policies; imports have now, in some measure, been liberalized. I hope that we appreciate that the recent decision was an act of considerable political will by the Japanese Government, and recognize our role in making beef and citrus the most pressing issues that had to be dealt with. In a sense, the Rowen article provides us with a lesson in the importance of choosing our symbols, and a warning to do a more effective job in the future.

As Rowen points out—correctly, in my view—the big issues for the future lie in those manufactured goods where we enjoy a comparative advantage: computing equipment, telecommunications equipment, and other technology goods. There the next battles will have to be fought. We must concentrate our efforts where we will accomplish the most.

For example, after considerable U.S. pressure, the Japanese Government recently modified a proposal that was submitted to the diet that would have restricted foreign ownership of new value added networks for data transmission. This was a welcome decision; it is in an area where the United States has had extensive experience—and Japanese companies relatively little—and shows that it is possible to work with the Japanese Government without resorting to symbolism.

The NTT Procurement Agreement provides another useful model for reconciling differing approaches to high technology policy. NTT is the Japanese telephones monopoly, which historically has procured all of its equipment needs from four Japanese companies. Late in 1980, the governments of the United States and Japan reached an agreement under which NTT's procurements would be open to competitive bid by American, as well as Japanese companies. Under the terms of the agreement—which was, incidentally, renewed earlier this year—NTT's procurements from U.S. companies have risen from $20 million per year to more than $140 million.

In addition, NTT has instituted procedures that facilitate the participation of U.S. companies in the Japanese market, and has sent several procurement delegations ot the United States to meet with U.S. manufacturers. While sales have not yet approached the level that I had hoped to see, there has clearly been an improvement, both in actual results and in reconciling differing approaches to the high technology marketplace.

I commend the following article to my colleagues' attention, and hope that we will all learn from the recent relaxation of restrictions on imported beef and citrus.

The article follows:

JAPAN PROBLEM ISN'T BEEF; IT'S HIGH-TECH TRADE

The Japanese are canny: For the past several years, they have kept American trade negotiators off balance, ducking demands for larger sales of American beef and citrus products to Japan. To be sure, as Japanese government officials say, there has been great political pressure from Japanese agriculture lobbies to keep out high-quality beef and citrus products from abroad.

But while all attention was focused on these politically volatile products, little could be done to settle more basic issues, including Japanese resistance to imports of manufactured goods. At the moment, a critical confrontation looms over American efforts to sell satellite and other high-technology products in a growing Japanese market, and to get agreement on licensing computer software, an area where the United States is clearly ahead.

Against an American trade deficit of more than $20 billion a year with Japan, the extra sales of beef, oranges, etc., that will result from a new agreement may amount to a paltry $200 million annually, a mere trickle against the value of other products that the United States would like to sell Japan. As Ford Motor Co. Chairman Philip Caldwell grumbled, "The beef isn't worth more than about 16,000 cars."

But every time U.S. Trade Representative William E. Brock appeared before a congressional committee to discuss the whole range of trade issues between the United States and Japan, he heard a familiar chorus from representatives of farm states:

"How about beef and citrus?"

Japan, for its part, protested that a nation that had been on the edge of starvation in the last few years of World War II had to assure itself of a minimum level of domestic agricultural production, even if it could buy cheaper food abroad.

"Japanese consumers are willing to pay the costs," Ambassador Yoshio Okawara told the National Governors Conference in Portland, Me., last year.

Thus the beef/citrus issue gained enormous symbolic and political importance here and in Japan. A Japanese concession on beef and citrus that would have been small in a macroeconomic sense, muting larger issues, was one that the Japanese were unwilling to make.

So Congress began to chatter about a 10 percent import surcharge, and Brock himself bluntly told Japanese officials that beef and citrus quotas would have to be increased substantially, or the United States would take specific measures to restrict imports of Japanese goods.

Last weekend, Japan capitulated, agreeing to nearly double its import quotas for high-quality beef.

Under an expiring five-year agreement on beef and citrus, allowable U.S. exports of high-grade beef to Japan had been increasing by 3,300 metric tons a year, to the present level of 30,800 tons a year. (The American Cattlemen's Association says, however, that counting all grades of beef, total exports to Japan were 60,575 tons, or 65 percent of the U.S. global total of 93,045 tons last year.)

Under the new deal, Japan's high-quality-beef quota will rise to 58,400 metric tons at the end of four years. The citrus quotas will be boosted from 82,000 tons to 126,000 tons, and there will be comparable increases for juice.

Roger Berglund, president of the Cattlemen's Association, who grumbled that "we're still disappointed," fails to mention that American beef, as well as other meat products, are protected by the Meat Import Act. That provides a formula limiting beef imports here if domestic production exceeds demand. It's one of many American devices protecting farmers, including import restric-